

UNITED STATES GOVERNMENT

# Memorandum

LIBRARY OF CONGRESS

TO : Richard E. Glasgow  
Chief, Examining Division

DATE: May 24, 1971

FROM : Marybeth Peters  
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SUBJECT: Record and Tape Piracy vis-a-vis the Copyright Act

## I. QUESTIONS PRESENTED:

What action can the Copyright Office take under Sections 1 (e) and 101 (e) of the Copyright Act (Title 17, U.S.C.) to ameliorate the pressing problem of record and tape piracy? Specifically, should the Copyright Office issue regulations refusing to record notices of intention to use from unauthorized duplicators?

## II. CONCLUSION:

Under the present law, the Copyright Office cannot issue regulations refusing to record notices of intention to use submitted by record or tape pirates. To do so the Copyright Office would have to decide either that records were in some aspects copyrightable or that dubbed records were completely outside the present statute. Neither the provisions of the law itself nor the adjudicated cases support such a conclusion. Moreover, such a course of action would be administratively unfeasible. However, the Copyright Office recognizes that record companies do have protectible interests in their recordings, and although we are not authorized to take any action under the present statute, it is recommended that we support Senate Bill 646. 1/

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- 1) S. 646, 92nd Cong. 1st Sess., is a bill to amend the copyright act. The language is essentially that found in Sections 102, 114, and 402 of the revision bill. Only dubbing would be protected. This bill is identical to S. 4592 introduced in the second session of the 91st Congress. It would become effective three months after enactment.

## DISCUSSION:

Today there is a great concern in the record industry over the recent developments in record and tape piracy. <sup>2/</sup> The type of piracy that concerns the record companies is the practice of re-recording a phonograph record or tape manufactured by another company and then selling the duplicates. This involves the transferring of the sound of a commercial recording to another disc or tape and selling it without authorization from either the musicians or the maker of the original recording. <sup>2/</sup> This type of activity is frequently known in the trade as "dubbing."

In making phonograph records the performance of the musician is electronically reproduced on a matrix. A "master" collectively refers to the matrix, a subsequent metal impression called the "mother" and the stamper used in the pressing machines. Retail disks are produced from the master, and subsequently the master is stored in a vault. The records or pressings sold to the public represent a great deal of engineering and artistic skill as well as considerable expenditure. Record companies claim intangible property rights in the performance captured in the grooves of the record. They firmly disavow the idea that the purchaser acquires the right to re-record the performance and manufacture records or tapes.

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- 2) "The phonograph industry distinguishes among three different types of unauthorized duplication. 'Counterfeiting' is the manufacture of a replica of the entire original record including its label and outside jacket (if any). 'Piracy' is the duplication of recordings, frequently from several different sources, and their release under another label; the artists generally are not listed or are given fictitious names. 'Bootlegging' is the term applied to unauthorized overproduction by independent pressing plants manufacturing the genuine records under contract with the producing company." Diamond: Sound Recordings and Copyright Revision 53 Iowa Law Review 839 (1968). Counterfeiting is less widespread because a 1962 Federal statute provides for criminal penalties for anyone who knowingly and with fraudulent intent, transports, receives, sells or offers for sale in interstate or foreign commerce any phonograph record, disk, tape, etc. to which or upon which is stamped, pasted or affixed any forged label, knowing the label to have been falsely made. This law does not, however, cover the phonograph record itself.
- 3) Stereo Review, Feb. 1970, p. 61.

Although pirating has been a problem for some time, the development of the tape cartridge and cassette has opened vast new markets to unauthorized duplicators. Illegally duplicating tapes is much simpler than dubbing discs. <sup>4/</sup>

Some unauthorized duplicators have incorporated and tried to confer an aura of respectability on their operations by giving their companies catchy names. In an attempt to avoid the dicta in Sears and Compco, some of the unauthorized duplicators have included the following statement on their labels:

No relationship of any kind exists between Tape-A-Tape and the original recording company, nor between this recording and the original recording artist. This tape is not produced under a license of any kind from the original recording company nor the recording artist(s) and neither the original recording company nor artist(s) receives a fee or royalty of any kind from Tape-A-Tape. Permission to produce this tape has not been sought or obtained from any party whatsoever. <sup>5/</sup>

Pirating is profitable because of the great cost differential. Record companies expend great effort and substantial sums of money for the commercial exploitation of their albums.

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- 4) E.g. In making tape cartridges the pirates purchase an album and make a tape recording of the exact sounds recorded on the album. The tape is made by playing the album on a record player connected to a tape recorder which turns out a tape. When this master tape is finished, it is placed on a machine known as a "tape playback deck." The "tape playback deck" is connected to machines known as "tape slaves" which in turn made additional tape recordings of the sounds which have been transferred from the record album to the master tape. A large number of "tape slaves" may be connected to one "tape playback deck" so that a correspondingly large number of tape recordings can be made at once. After the tapes have been made, each of the new tapes is placed on a hub. Each hub is placed into a plastic cartridge and the ends of the tape are spliced together so that it forms a continuous "loop" in the cartridge. The cartridge is sealed, tested, packaged and labeled. Tape Industries Association of America v. Younger, 316 F. Supp 340 (C.D. Cal. 1970), appeal dismissed for lack of jurisdiction, 401 U.S. 902.
- 5) C.B.S. Inc. v. Gary A. Spies, doing business as Tape-A-Tape Sound Reproductions Co. No. 69--CH--3477 (1970 Circuit Court of Cook County) (R.4).

Some of the costs incurred by legitimate record companies are: the various expenses in producing a "master" record; the expense of manufacturing records and tapes; the expense of advertising and promoting albums and tapes; the expense of paying the copyright proprietors, and the expense of paying the royalties to the recording artists and to the various trust funds established by collective bargaining agreements in the industry. Other than the small sums required to make and distribute their discs or tapes, pirates usually do not have any other expenses.

Thus, 'pirating' presents a serious problem to the legitimate record companies. Henry Brief, Executive Director of the Recording Industry Association of America (RIAA), has estimated that one out of every three prerecorded tapes sold in this country in 1969 was a pirated copy of a commercial release. <sup>6/</sup> A tremendous number of pirated discs are also on the market. It is estimated that pirated revenue amounts to more than \$100 million a year. <sup>7/</sup> The urgency of the problem is reflected by the full-page ads in the trade publications warning that unauthorized duplication is plain theft.

Against such unauthorized duplication there is little protection. It has been accepted generally that the copyright statute does not protect against unauthorized duplication such as dubbing. Only New York, California and Tennessee have criminal statutes forbidding the practice. <sup>8/</sup> A similar bill has been introduced

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6) Stereo Review, Feb., 1970, p. 61.

7) Newsweek, Oct. 5, 1970, at p. 70 column 3.

8) CAL. PENAL CODE § 653h (West 1968); N.Y. GEN. BUS. LAW § 561 (1967); N.Y. PENAL LAW, § 441c (McKinney Supp. 1967). The statutes of these two states are similar. Each declares it a misdemeanor for any person to knowingly and willfully, and without the consent of the owner, cause to be transferred any sounds recorded on a phonograph or record or other article on which sounds are recorded, with intent to cause to be sold, or to be used for profit through public performance, the article on which sounds are so transferred, or for any person to sell any such article with knowledge of transfer, without consent of the owner. "Owner" is defined as the person who owns the master record from which the transferred sounds are directly or indirectly derived. Recently a group of unauthorized duplicators sued in Los Angeles challenging the validity of the California statute. They lost their suit and appealed to the Supreme Court. The appeal has been dismissed and the case is now before the Ninth Circuit. Tape Industries Association of America v. Younger, 316 F. Supp 340 (C.D. Cal. 1970), appeal dismissed 401 U.S. 902. The Tennessee bill would make piracy a felony. For violation the bill provides for a fine of not more than \$25,000 for the first offense and from one to three years in prison; for any subsequent offense--not more than \$100,000 and

in Arizona. <sup>9/</sup> In addition, the city of Los Angeles has an ordinance prohibiting the unauthorized dubbing of phonograph records. <sup>10/</sup>

It is unfortunate that the revision bill <sup>11/</sup> has not been enacted for it would specifically provide the relief now sought by the record companies. The prospects of early enactment during this session of Congress appear to be dim unless the FCC hearings resolve the CATV issue. Of notable interest, since I began this study, a bill to amend the copyright act to provide protection against dubbing has been introduced in the Senate. <sup>12/</sup>

It has been accepted generally that most unauthorized duplicators do not pay royalties and do not attempt to comply with the copyright law. <sup>13/</sup> However, Mr. George Shiffer, at whose request this study was initiated, in his letter of June 26, 1970, indicated that an unauthorized duplicator in North Carolina intended to rely on the compulsory license provisions and pay the two cents royalty

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8 cont.) 3 to 10 years in prison. The only exemption is for broadcasters.

- 9) Billboard, March 9, 1971, p. 20.
- 10) LOS ANGELES MUNICIPAL CODE, Section 42.19.1 (1948).
- 11) S. 644, 92d Cong., 1st Sess. (1971).
- 12) S. 646, 92d Cong., 1st Sess. (1971).
- 13) See Miller v. Goody 139 F. Supp. 176 (S.D.N.Y. 1956) rev'd. on other grounds sub nom Shapiro Bernstein and Co. v. Goody, 248 F. 2d 260 (2nd Cir. 1957).

to the copyright proprietors. Apparently this unauthorized duplicator intends to rely on a statute in North Carolina<sup>14</sup> which essentially terminates all common law remedies once a record has been sold. Because of the broad language of the statute, dubbing would presumably be covered. It seems that this duplicator has been the recipient of expert legal advice on loopholes in the federal and state statutes.

In the past few months two North Carolina law firms, Richards and Shefte, representing G and G Sales, Inc., doing business as ETC, and Levine, Goodman, Murchison and Wheeler, representing Custom Recording Co., Inc., have sent hundreds of notices of intention to use to the Copyright Office. This is noteworthy since the Copyright Office normally receives few such notices.

Intentional appropriation is an unconscionable practice, and the Copyright Office has, therefore, been asked to look again at sections 1 (e) and 101 (e) of the statute to determine the meaning of those sections and to consider whether it could refuse notices of intention to use from unauthorized duplicators.

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- 14) N.C. Gen. Stat. c. 66, 68-28 (1952) provides: "When any phonograph record or electrical transcription upon which musical performances are embodied, is sold in commerce for use within this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any persons are hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted tangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated. . ."

Many areas are related to this study: performance rights, the desirability of a compulsory license provision, the question of what constitutes publication, and international aspects of piracy. All of these topics have been adequately considered in other articles and this study, therefore, will deal only with the unauthorized duplication of sound recordings under the present statute. Also, the rights of record companies under the theories of common law copyright, unfair competition and interference with contracts as viewed in light of Sears and Compro will be covered in another study assigned to another member of the staff.

#### A. Legal Considerations

In dealing with the legal aspects there are two questions which must be considered. They are:

1. Is dubbing an infringement under §101 (e)?
2. If dubbing is not an infringement, is there any other basis in the statutory language to justify refusal to record a notice of intention to use from an unauthorized duplicator of a sound recording?

Each of these questions will be examined in turn.

#### Is dubbing an infringement?

To adequately cover the subject, it is necessary to go back to the famous White-Smith case.<sup>15/</sup> The statute in question was the Act of 1891 as amended in 1897. In construing that statute, the Supreme Court held that the statute provided for the copyright of certain tangible things, not expressions apart from the medium by which they are conveyed. To use its words:

"Throughout the act it is apparent that Congress has dealt with the concrete, and not with an abstract, right of property in ideas or mental conceptions."<sup>16/</sup>

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15) White-Smith v. Apollo, 209 U.S. 1 (1908).

16) Id. at 16.

The thing copyrighted was, the court held, the written musical score, not the music itself, and, a piano roll was not a copy since it was not "written or printed . . . in intelligible notation." <sup>17/</sup> Though the court indicated that its decision produced an undesirable result the court stated that it was up to the legislature to address itself to the problem. Though this case dealt only with perforated music rolls, by analogy the same reasoning would apply to sound recordings.

The year after the White-Smith decision Congress recognized for the first time recording and mechanical reproduction rights in certain classes of works with the enactment of the U.S. Copyright Act of 1909. <sup>18/</sup>

Congress could easily have made the right to record an exclusive right. It could also have provided that records are copyrightable. However, it appears that the Aeolian Co. and the then major music publishers, who were copyright owners of many songs, had made exclusive contracts which would have become effective upon the recognition of a mechanical reproduction right. Anti-trust regulation was still in its infancy, and it appears that Congress was fearful that a monopoly would arise in the recording industry. <sup>19/</sup> Thus, Congress qualified the right to record with a compulsory license provision.

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17) Id. at 17.

18) Act of March 4, 1909, 17 U.S.C. 1 et seq. (1964).

19) Hearings on S. 6330 and H.R. 19853, 50 Cong., 1st Sess., pp. 23 - 26, 94 - 97, 139 - 148, 166, 185 - 198, 202 - 206, (1906).



The pertinent sections enacted in 1909 are Sections 1 (e) and 101 (e). Section 1 (c) provides:

To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purpose set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyright work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

Section 101 (e) provides:

Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: Provided also, That whenever any person in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice, and in case of his failure so to do the court may, in

its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e) of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

These provisions essentially provide that when a copyright owner permits a recording to be made of his work, he must file a notice of use (Form U) in the Copyright Office. His failure to do so will constitute a complete defense to a suit for infringement. Anyone else wanting to take advantage of the compulsory license may do so by simply sending the copyright owner a notice of his intention to do so and a duplicate of that notice to the Copyright Office. The subsequent recorder can be required to submit to the copyright proprietor a monthly accounting, together with the royalty payment due. If the user does not comply with these requirements, he is liable for treble damages. The copyright act neither expressly grants nor expressly denies copyright protection to phonograph records. However, to conclude that dubbing is prohibited by the statute, records would have to be considered copyrightable in at least some aspect.

There have been very few cases dealing with this specific problem. An early case was that of Aeolian v. Royal Music Roll Co. <sup>20</sup>/ In that case the Aeolian Company, who manufactured their music rolls under a license agreement with the copyright owner, sued Royal Music Roll Co. for the unauthorized "copying and duplicating" of its products. The suit was for infringement under the copyright statute enacted in 1909. The court held that under the compulsory license provision:

the subsequent user does not thereby secure the right to copy the . . . record. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyright composition or sheet music . . . <sup>21</sup>/

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20) 196 Fed. 926 (W.D.N.Y. 1912).

21) Id. at 927.

The case is interesting but the holding of the court is open to severe criticism. The problem with the case is that the court conceded at the outset that it was generally accepted that mechanical reproductions of music were not in themselves subject to copyright. However, the court granted relief to the plaintiff on the basis of the copyright act. The court said that while 1(e) permits a manufacturer to make his own records of a copyrighted composition without express permission, it does not authorize the duplication of a licensee's records. It would seem that the court was motivated by a sense of justice and fair play - that is, by a belief that a subsequent user should not have the right to appropriate the skill and labor of his competitor. However, the compulsory license provision does not appear to protect the skill and labor of a record company. If this decision were correct, the practical effect of it would be to give the record company a copyright in its record. Yet the court began with the assumption that records were not the subject of copyright.

Although the Acolian case has never been expressly over-ruled, in view of the decision in the Capitol Records case <sup>22/</sup> it is doubtful that the Acolian case is good law today. It has been suggested that this case represents an unsuccessful attempt to bring a case of unfair competition under the federal copyright statute. <sup>23/</sup>

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22) Capitol Records, Inc. v. Mercury Records Corp., 221 F. 2d 657 (2nd Cir. 1955).

23) See Ringer, The Unauthorized Duplication of Sound Recordings, (Copyright Law Revision Study No. 26, Comm. Print 1961) p. 7.

The case of Fonotipia v. Bradley <sup>24/</sup> involved the duplication of the plaintiff's records by the defendant under its own distinctive label. The records were advertised as duplicates of the original disk and were sold at half price. The cause of action arose prior to the enactment of the 1909 act. Thus, the applicable law was the Act of 1891 as amended in 1897. On the basis of this law there could be no relief under the statute, though relief was granted on a theory of unfair competition. However, in dicta, the court indicated that the 1909 act would have provided the relief the plaintiff sought. Thus, the court seemed to say that the 1909 act protects against record piracy.

Unfortunately, the court was confused about the effect of the 1909 act. To use its words:

Since the beginning of the present action, the copyright law has been amended, and since the first day of July 1909, any form of recording or transcribing a musical composition, or rendition of such composition has been capable of registration, and the property rights therein secured under the copyright statute ... <sup>25/</sup>

Thus, the court based its remarks on the falacious assumption that section 1 (e) made records the subject of copyright under the 1909 act and that registration of such claims could be made. In view of the decision of the court in the Capitol Records case, the Fonotipia case is useless as a pronouncement of what the law is.

Perhaps relying on the Fonotipia case, the Copyright Office, starting about 1914 and continuing through 1924, made approximately 3,000 registration in Class E for player piano rolls. These registrations were made in the name of the American Piano Company. <sup>26/</sup>

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24) 171 Fed. 951 (E.D.N.Y. 1912).

25) Id. at 963.

26) Interoffice memorandum from L.C. Smith to Arthur Fisher, Register of Copyrights, dated 2-2-55.

The applications submitted by the American Piano Company contain the following statement: "Copyright is not claimed in the original composition, but is based upon the new authorship of, and is claimed in . . . (author's) . . . interpretation represented in the eligible notation thereof contained in the copies filed."

It is not entirely clear when we started to refuse to make such registrations. However, in a letter dated January 29, 1921, addressed to Mr. Adolfo Mesorana, San Justo 17, Puerto Rico, and prepared by Mr. Herbert A. Howell for the Register's signature, the following is found:

" 'In reply we beg to state that the copyright law contains no express provision for the registration of "music rolls," or similar mechanical devices for reproducing music. The copyright law does expressly provide for the registration of "musical compositions" and such copyright includes also "the control of parts of instruments serving to reproduce mechanically the musical work" such as perforated rolls and phonographic records subject to the conditions laid down in Sec. 1 (c), but there is no provision or requirement in the law for deposit of mechanical devices (the perforated rolls) for reproducing the tune. " <sup>27</sup>

The Office did not register Mr. Mesorana's player piano rolls.

The next important step occurred in the thirties. In 1935, as a test case, Fred Waring sought to register a claim to copyright in his "personal interpretation." The then Register refused such an application on the ground that under the 1909 act recorded performances are not subject to copyright. <sup>28</sup>

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27) Id.

28) See Capitol Records, Inc. v. Mercury Records Corp. cited in note 21 at 114. (Unfortunately, I was unable to locate the correspondence.)

After the Copyright Office refused to register Fred Waring's claim, he brought suit in a Pennsylvania court alleging violation of his common law copyright and unfair competition. 29/ The state court granted relief to Mr. Waring in part on the basis that renditions were not copyrightable under the 1909 copyright act. 30/ This belief apparently was based on a letter to the court to that effect from the Register of Copyrights.

Notwithstanding a brief period of registering claims in piano rolls, the policy of the Copyright Office has consistently been that records, at least under the present act, are not copyrightable. This policy is set forth in §202.8 of our Regulations. 31/ This policy is supported by the late Professor Zachariah Chafee and has been affirmed in the Capitol Records case.

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- 29) Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A.631 (1937).
- 30) The court found that the performances involved had such novelty and artistic creativeness as to justify the recognition of a common law property right in them. However, an important point in this case was the restrictive statements on the legend which the court held saved the plaintiff from dedicating his work to the public.
- 31) 37 CFR §202.8 (b) (1967) states: "A phonograph record or other sound recording is not considered a 'copy' of the compositions recorded on it, and is not acceptable for copyright registration. Likewise, the Copyright Office does not register claims to exclusive rights in mechanical recordings themselves, or in the performances they reproduce."

Professor Chafee in his article, REFLECTIONS ON THE COPYRIGHT LAW <sup>32/</sup> suggests that records are writings and that they are potentially copyrightable. However, he points out that recordings do not fit the machinery of the present law. He suggests that "writings" as used in Section 4 of the statute may have a narrower meaning than "writings" as used in the Constitution. Thus, he indicates that if a work is considered a "writing" under the Constitution then it would also be considered a "writing" under the statute unless it could be shown that it would not fit into the legislative machinery and is contrary to legislative history. He feels that Section 4 of the copyright statute does not exhaust "writings" under the Constitution. Thus, something that is not presently considered copyrightable may be made copyrightable.

The most important case in this area is that of Capitol Records, Inc. v. Mercury Records Corp. <sup>33/</sup> In that case Telefunken, a German corporation, had licensed Ultraphon, a Czech company, to sell records manufactured within Czechoslovakia from Telefunken masters. After World War II, German property in Czechoslovakia was seized by the government. The matrices were transferred to Gramophone. Gramophone then entered into an agreement with Mercury Records under which it agreed to let Mercury make and sell records in the United States. However, at approximately the same time Telefunken, with the approval of the Joint Export-Import Agency in the United States sector of Berlin, granted to Capitol Records the right to import matrices identical to those of Ultraphon and make records in the United States. <sup>34/</sup> The case contains confusing jurisdictional questions but ultimately Capitol Records was granted injunctive relief although it is not clear from the decision whether the relief was granted on the basis of unfair competition or common law copyright. However, for the purpose of this study the importance of this case lies in its statements concerning the copyrightability of records.

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32) 45 COL. L. REV. 719 (1945).

33) 221 F. 2d 657 (2d Cir. 1955).

34) Note, "Piracy on Records," 5 STAN. L. REV. 433 (1953).



Both the majority opinion and the dissent by Judge Learned Hand reach the conclusion that records are not copyrightable under the present statute, but they use different means to reach this conclusion.

The majority opinion states that there is no doubt that under the Constitution, Congress could have given one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition. The Court also stated that prior to the 1909 act that Congress had not given such a right.

The Court cited the White-Smith case as establishing the principle that the making of a music roll did not constitute an infringement of the copyright proprietor's exclusive right to make copies, and that records, therefore, were not considered "copies" of the musical composition.

From this the court concluded that it was not the intention of Congress to make a virtuoso's rendition on a music roll copyrightable because the act before 1909 provided that "No person shall be entitled to a copyright unless he shall . . . not later than the day of publication . . . deliver at the office of the Librarian of Congress . . . two copies" of the work in which the copyright was sought. <sup>35/</sup> The Court then went on to point out that the recording was the only possible means of preserving the performance--yet "copies" which were necessary to secure copyright had been held not to be "copies."

Congress, the Court pointed out, could have changed the result in the White-Smith case by simply stating that a mechanical reproduction of a musical composition should constitute a "copy" within the meaning of the act but Congress did not do so. Judge Dimock, writing for the majority, stated that nothing in the Act indicated any intention that a record should be a "copyrighted work." He said that Section 1 (e) refers not to copyright "of" the parts of instruments serving to reproduce mechanically the musical work, but copyright "controlling" such parts. It further refers to the use of the "copyrighted work" upon the parts of instruments.

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35) 221F. 2d 657, 660.

Judge Hand, in his dissent, adopted Professor Cha fee's theory. Thus, he believed that the performance or rendition of a "musical composition" is a "writing" under Article I, Section 8, Clause 8 of the Constitution separate from and additional to, the "composition" itself. He stated that Section 4 should not be taken to apply to records because to do so would be to ignore the very specific provisions of Section 1 (e) regulating infringement of "musical compositions" by "mechanical reproduction." Additionally, he stated that although Congress meant to depart from the existing denial of mechanical infringement of "musical compositions," and to adopt in general the view of the concurring opinion of Justice Holmes in the White-Smith case, it did not choose to make mechanical reproductions infringements in the ordinary sense. He stated:

[O]bviously, it thought that this kind of invasion of a composer's property demanded only a limited remedy, which it specifically prescribed: two cents for each record. If we were to hold that records made of the renditions of a singer were copyrightable, this limitation could scarcely be imported into their infringement, which in its absence would therefore carry the same remedies as any other infringement. <sup>36/</sup>

This, he felt, the court had no right to assume. Thus, he said it was a serious matter to impose implied limitations upon the words of a statute that apparently express the deliberate purpose of exercising a constitutional power to its full scope; nevertheless, he believed that this was an occasion when the court was forced to do so. For that reason he stated that he thought that the records of Telefunken, though they are "writings" under the Constitution, could not have been copyrighted under the Act.

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36) Id. at 115.

After this case, it seemed clear that while records are potentially copyrightable under the present act they are not protected. Thus, the Capitol Records case is still important today although the actual holding of the case has been rendered doubtful by the action of the Supreme Court in Sears and Compco. 37/

Finally, an examination of the legislative history of the 1909 Act seems to reinforce the conclusion that records are not copyrightable. In the House report the Committee states:

It is not the intention of the committee to extend the right of copyright to mechanical reproductions themselves but only to give the composer or copyright proprietor the control, in accordance with provisions of the bill, of the manufacture and use of such device. 38/

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37) Sears, Roebuck & Company v. Stiffel Company, 376 U.S. 225 (1964) and Compco Corporation v. Day-Brite Lighting, Inc. 376 U.S. 234 (1964). In Sears Justice Black, writing for the majority, stated that an unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. Additionally, the court stated: "Because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article or award damages for such copying." The court in Compco, however, indicated that the traditional view of unfair competition might still be sustained as a valid exercise of the states' regulatory power. To use its words: "A state of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturers' reputation or quality and integrity deceive the public by palming off their copies as the original." (At 238) In view of these cases it would appear that state courts cannot grant relief if only misappropriation is involved. It also seems likely that these courts cannot grant relief under the theory of common law copyright. Sears laid down a pre-emption doctrine which implies that the question of whether or not there has been a publication which would divest any common law copyright is to be decided in accordance with federal law. A logical result of this would be that our present criteria for determining publication, i.e. whether copies have been sold, placed on sale, or publicly distributed, would be applicable to records. Thus, the sale of records would divest the work of any common law protection.

38) H.R. Report 2222 (60th Cong., 2nd Session), p. 9.

On the basis of the pertinent cases and the legislative history, therefore, it seems clear that dubbing does not constitute an infringement under the present statute.

IF DUBBING IS NOT AN INFRINGEMENT, IS THERE ANY OTHER BASIS IN THE STATUTORY LANGUAGE TO JUSTIFY REFUSAL TO RECORD NOTICES OF INTENTION TO USE FROM UNAUTHORIZED DUPLICATORS?

The fundamental question to be considered is: does the "similar use" permitted by the statute in 1 (e) include an "identical use?" In addition to the Aeolian case, which has been severely criticized, the only case directly in point is that of Miller v. Goody.<sup>40</sup>

There were two principal defendants in that case--Krug, who had taped certain of Glenn Miller's wartime radio broadcasts and from these tapes manufactured his own records, and Goody, the retailer who sold them. Actually there were two stages of litigation. In the first suit Glenn Miller's widow, suing on unfair competition and invasion of privacy theories, and the copyright proprietors of the recorded musical compositions, suing under the mechanical reproduction sections of the Copyright Act, joined both Krug and Goody. They sought a permanent injunction to prevent further manufacture and sale of the records and money damages. The court held that although a temporary injunction might issue against Krug and although his equipment might be confiscated, his subsequent payment of the statutory royalty of two cents per recording would grant Krug the right to have the injunction dissolved, to have his equipment returned, and to resume manufacture. Krug, however, settled with the plaintiffs and the case proceeded against only the retailer, Goody.

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40) 139 F. Supp 146 (S.D.N.Y. 1956).

What is interesting in this case is a statement made by the court. In a footnote to the opinion the court said:

Ordinarily, they (unauthorized duplicators) also omit payment of the copyright, although, as far as the copyright law is concerned, even a pirate has the right to record a copyrighted musical composition provided he files notice of intent and pays the royalties. <sup>41/</sup>

This was also the opinion of the circuit court which heard the appeal. <sup>42/</sup> Thus, both courts apparently felt that an unauthorized duplicator is a subsequent user within the terms of the Act.

This position is supported by Nimmer. He indicates that if an unauthorized duplicator files a notice of intention to use and later pays the compulsory license royalties that "the somewhat astounding result is that he is not an infringer under the Copyright Act." <sup>43/</sup> He points out, however, that there may be remedies for victims of record piracy, i.e., for the record companies and performers, but these might lie under the theories of unfair competition and common law copyright.

In addition, this position is supported by others. <sup>44/</sup>

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<sup>41)</sup> Id. at 180, N. 4.

<sup>42)</sup> In the appeal, Shapiro, Bernstein and Co. v. Goody, 248 F. 2d 260 (2d Cir. 1957), the circuit court expressly adopted the language of the district court reversing only as to the non-manufacturing seller.

<sup>43)</sup> Nimmer on Copyright (1970 ed.) at 430.

<sup>44)</sup> Ringer, supra note 23 at 10. Note, "Piracy on Records," 5 STAN. L. REV. 433 (1953); Young, "Sound Recordings, Records, and Copyright; Aftermath of Sears and Compco," 33 ALBANY L. REV. 371 (1969).

An argument may also be made on the basis of Section 101 (e) of the statute itself. The pertinent language in that section is: "provided also, that whenever any (emphasis added) person, in the absence of a license agreement, intends to use a copyrighted musical composition . . ." Prior to the 1909 act dubbing did exist although it was not widespread; however, it usually occurred in conjunction with "passing off" and common law remedies were therefore available. Thus, it was not considered a pressing problem at the time. However, it seems likely that Congress was aware of the problem. In view of this it seems arguable that the word "any" should be given its ordinary meaning.<sup>45</sup> If Congress was aware of the problem, then its failure to explicitly exclude dubbing from the act would appear to be deliberate, and "any" person as used in Section 101 (e) would appear to include one who dubbed.

From this it would seem that there is no basis to refuse notices of intention to use from unauthorized duplicators. It has been argued, however, that an unauthorized duplicator should not be considered as being within the purview of the copyright act.<sup>46</sup> The rationale employed to reach this conclusion is that while the Act gives rights to subsequent reproducers, "subsequent user" should be construed to include only bona fide subsequent reproducers; that the Act gives no rights to converters of property and that the pirate by re-recording his duplications has in effect stolen that number of the original record. It has also been argued that an unauthorized duplicator's minimal efforts and costs should not be allowed to cloak him with the businessman's status and obscure the true nature of his acts.

Although these arguments are appealing, they are against the weight of authority. Thus, the Copyright Office should not change its present practice of recording all notices of intention to use without further action by Congress or the courts.

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45) In Webster's Second International Dictionary (2d Edition) Unabridged, "any" is defined as indicating a person, thing, etc., as one selected without restriction or limitation of choice with the implication that everyone is open to selection without exception.

46) See, "Recent Cases: Copyright Act — Mechanical Reproduction Sections — Record Pirate and his Distributor within Compulsory Licensing Provisions," 13 RUTGERS L. REV. 365 (1958).

## ADMINISTRATIVE CONSIDERATIONS

In addition to the legal issues, it is necessary to consider also whether or not it would be administratively feasible to refuse to record notices of intention to use from unauthorized duplicators. There are essentially four arguments that support the present practice of recording all notices of intention to use. These will be examined in turn.

The first point concerns the problem of determining whether or not a notice of intention to use is from an unauthorized duplicator. Mr. Shiffer has indicated that this would be no problem as pirates are blatant about their activities. In an effort to avoid being found guilty of "passing off" the recorded performances as those of their competitors, they announce to the whole world what they have done.

At present there is no form for a notice of intention to use. The statute merely provides ". . . he shall serve notice of such intention . . . upon the copyright proprietor . . . sending to the Copyright Office a duplicate of such notice. . . ." <sup>47/</sup> The intended user simply states his intention in a letter to the copyright proprietor and sends the Copyright Office a carbon copy. Upon payment of the required fee, the Copyright Office records this notice of intention to use.

Although there are many variations, a typical notice of intention to use reads:

Gentlemen:

We represent (name) of (address), and we have been instructed to give you notice in accordance with Section 101 (e) of the Copyright Statute that (name) intends to use the below identified musical composition(s) upon the parts of instruments serving to reproduce mechanically the musical work:

Title of Work(s)

Author(s)

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47) 17 U.S.C. 101 (e).

Unless a mutually acceptable arrangement is made regarding the payment of statutory royalties, (name) intends to submit to you, a report on the 20th day of each month, on the number of parts manufactured during the previous month, together with a check covering a \$.02 royalty for each such part manufactured.

Very truly yours,

It seems unlikely that an unauthorized duplicator would admit his intention to dub an existing record. Thus, without a formal application it would probably be impossible to determine whether or not the notice was from an unauthorized duplicator. The Register of Copyrights could, however, issue an appropriate form. Such a form might contain a statement to be affirmed by the intended user that he will make a similar use, i. e., not an identical use.

Issuing a form, however, would not really remedy the situation. Usually notices of intention to use are filed before recordings are made.<sup>48/</sup> Thus, what the user would be asked to certify in the form would not be a matter of fact but rather a matter of intent, which is a rather elusive concept. It seems probable that all users would indicate that they "intended" to make a similar use. If they did, the Copyright Office would have no alternative but to record the notices as filed. Whether or not the user actually dubbed an existing record could not be determined until after his records were manufactured.

Thus, though pirates are blatant about their activities and while they admit on either the record jacket or label that the record or tape is dubbed, it does not necessarily follow that they would admit this on a form for a notice of intention to use.

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48) Lately we have found that the user did not file before the records were manufactured because an initial search of our files, which are not current, did not reveal either a registration for the musical work and/or the filing of a notice of use.



A second consideration concerns certain state statutes. Our refusal to record notices of intention to use would have to be based on a belief that dubbing was not within the scope of the compulsory license provision--that pirating was reprehensible and that those injured should be afforded greater relief than that afforded by the copyright statute. This relief most logically would be based on either a theory of misappropriation or common law copyright, although some states have granted relief on different grounds. Unfortunately, such a determination on the part of the Copyright Office would bring it into direct conflict with statutes in effect in North Carolina, South Carolina and Florida.<sup>49/</sup> These laws were enacted in the forties and were aimed at counter-acting the Waring decisions. It was the intent of the legislators in those states to prevent the collection of performance royalties from broadcasters and other similar secondary users. However the broad language of these statutes and the legislative history may prevent a common law action for dubbing in these three states.<sup>50/</sup>

The text of the provision is as follows:

"When any phonograph record or electrical transcription upon which musical performances are embodied, is sold in commerce for use within this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any persons are hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted tangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden.

Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intendment of this enactment is to abolish any common law rights attaching to phonograph records or electrical transcriptions whose sole value is in their use, and to forbid further restrictions or the collection of subsequent fees and royalties on phonograph records or electrical transcriptions by performers who were paid for the initial performance at the recording thereof."

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49) N.C. GEN STAT. c 66-68-28 (1943) S.C. CODE 66-101 (1942) and FLA STAT.ANN. 543.02, 543.03 (1943).

50) Ringer, supra note 23 at 9.

It is not our function to comment on the wisdom or the soundness of these statutes. In addition, while the constitutionality of these statutes is open to question on the basis of the federal pre-emption doctrine, it certainly is not within the power of an administrative agency to conclude that these statutes are unconstitutional and therefore not binding. Moreover, if the Copyright Office took the position that pirated recordings were not within the scope of the compulsory license provision of the statute, then in those three states even the meagre royalty payments available to the copyright proprietor would be lost.

Another consideration concerns a policy of the Copyright Office. When there is some doubt as to whether or not the statutory provisions have been substantially complied with, the policy is to resolve doubtful claims in favor of the applicant. Thus, the Copyright Office will register a claim in a work which it believes a court might reasonably hold to be copyrightable, even though some decided cases and the prevailing view of the leading commentators suggest that it might not be the subject of copyright. A logical extension of this policy would be that the Register should not issue regulations if a court might not reasonably uphold them. Although it is not completely clear that a record or tape pirate is entitled to file a notice of intention to use, there is much support for such a position, and a court might reasonably so hold.

The most important consideration concerns the role of the Copyright Office and the rule-making power of the Register of Copyrights. Under Section 207 of the statute the Register is given rule making power "for the registration of claims to copyright as provided by this title." This is rather vague and doesn't clearly indicate just how far the Register is entitled to exercise judgment in issuing or refusing particular certificates or in defining general regulations. It is clear, however, that the Register's administrative decisions may have considerable practical importance to the claimants and others even though these decisions are not conclusive on the courts.

The Register does have the authority to refuse to register claims in works he feels courts would hold not copyrightable. <sup>51/</sup> However, while it is said that the Register has "discretion," this

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51) See *Bailie and Fiddler v. Fisher*, Civil Action No. 365, unreported (D.C.D.C. 1957), *aff'd* 258 F. 2d 637 (2d Cir. 1958) and *Vacheron and Constantin-Le Coultre Watches Inc. v. Benrus Watch Co.*, 155 F. Supp. 932 (S.D.N.Y. 1957), remanded on appeal, 260 F. 2d 637 (2d Cir. 1958).

must be understood in its context as referring to the fact that he must construe the statute and exercise judgment in determining whether a particular claim is eligible for registration under its provisions. "It seems clear that he has no quasi-judicial functions: his determinations are not final but subject to review and decision by the courts." <sup>52/</sup>

A notice of intention to use does not involve any judgment concerning copyrightability. In fact Section 101 (e) indicates that the role of the Copyright Office concerning notices of intention to use is merely that of a recorder. It is noteworthy that there is no standard to apply. The only pre-requisites are: 1) it is in fact a notice of intention to use and 2) it is accompanied by the required fee. Finally, it would appear that to refuse to record a notice of intention to use would be the equivalent of granting a substantive right which clearly is not the function of the Copyright Office.

and

Considering all of the legal administrative aspects of the question, it seems conclusive that we cannot refuse to record notices of intention to use from unauthorized duplicators. The only real solution to the problem lies in congressional action.

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52) Berger, Authority of the Register of Copyrights to Reject Applications for Registration. Copyright Law Revision Study No. 18, Comm. Print 1960, p. 94.

This study was completed in February 1971; the final draft was typed in May, 1971. Since that time there has been considerable activity in the courts. In addition, Congress has finally acted on the sound recording bill. The purpose of this addendum is briefly to attempt to bring this study up to date.

The most important development has been the passage of S. 646. Public Law 92-140 (85 Stat. 391) amended the copyright law to provide for a limited copyright in sound recordings fixed and published on or after February 15, 1972 and before January 1, 1975. A cut off date was included for apparently two reasons. First to provide Congress time adequately to consider the feasibility or even the desirability of including a compulsory license provision and second to encourage the enactment of the entire copyright revision bill.

This new amendment has already been challenged. Ronald Shaab, an unauthorized duplicator and also a composer, filed suit against the Attorney General and the Librarian of Congress. Shaab wanted, among other things, to enjoin the implementation and the administration of the sound recording amendment. In his brief he argued that the amendment is unconstitutional because sound recordings are not the writing of an author. A three judge statutory court was impaneled. Oral arguments on cross motions for summary judgment were heard on April 14, 1972 in the District Court of the District of Columbia. At that time it appeared that Shaab's argument was not that all sound recordings were not the writing of an author, but rather that the contribution of a record company did not constitute the writing of an author. Thus, even if the court found that the latter was true, the amendment would still stand. However, it is entirely possible that the court will find that Shaab failed to state a cause of action.

There has been much litigation concerning the activity of "tape pirates." Two of the decisions are notable. On pages 6 and 25 of this study, I referred to a North Carolina statute. I stated that the statute was enacted to prevent the collection of performance royalties from broadcasters but that the language of the statute is so broad that it would presumably prevent a common law action against unauthorized duplication of sound recordings. My opinion, not expressed in this study, was that to obtain relief a plaintiff would have to rely on the pre-emption doctrine; that is, that the federal government had pre-empted the area making the state statute unconstitutional. Such did not prove to be the case. In Liberty/UA, Inc. v. Eastern Tape Corp., 180 S.E. 2d 414, aff'g 181 S.E. 2d 600 (1971), the North Carolina Court of Appeals upheld a preliminary injunction granted to Liberty/UA restraining Eastern Tape Corp., G & G Sales Inc. and J.M. Pettis, principal of both firms, from pirating Liberty/UA recordings. (These are the two firms mentioned on page 6 of this study.) The court took a dim view of the activity of the defendants saying that

it allowed them to "circumvent a great portion of the cost of engaging in the record business." The court held that the defendant's activities constituted enjoinable unfair competition.

In its decision the court cited the land mark decision in the I.N.S. case [ I.N.S. v. Associated Press, 248 U.S. 215 (1918)] and stated that that decision was "particularly applicable" to the situation before it. The court noted that many commentators had said that the I.N.S. case must be limited to its own particular facts and mentioned that the defendants had also advanced this argument. However, the court found that the conduct of the defendants was "strikingly similar" to the conduct condemned in I.N.S.

The defendants had argued that the rationale of the Supreme Court decisions in Sears and Compro (See footnote 39 on page 19) precluded relief. In my opinion the defendants' argument was correct, in spite of the fact that all of the recent tape piracy cases, with one exception, have made a distinction between the copying allowed by the Sears and Compro cases and what they call appropriation, i.e., use of the identical product. The North Carolina Court also made this distinction and allowed relief. The one recent case that denied relief is CBS, Inc. v. Custom Broadcasting Co., Inc., 171 U.S.P.Q. 502 (S.C.C. P. 1971).

In their defense the defendants in the Liberty/UA case had also raised the North Carolina statute which is quoted on page 6. To my surprise the court held that this statute did not preclude relief. The court said that the statute was enacted in 1939 when record piracy was not a problem; that it was unlikely that the legislature had even heard of record piracy. The court stated further that it could not conceive that one of the purposes of the 1939 statute was to make legitimate such an unfair competitive practice.

If the reader recalls, the North Carolina statute eliminates any common law right to restrict the use of a recording sold for use in that state. To achieve the result it wanted, the court interpreted the word "use" to mean the use for which a recording is intended, i.e., the playing of the recording. The court said that while any record sold in commerce for use in North Carolina may be played privately, publicly, and commercially without restriction, it did not follow that the performance contained on a record can be re-recorded onto another record and the re-recording sold in competition with the original producer.

The most significant decision was that of the Ninth Circuit Court in the Duchess case. Duchess Music Corp. v. Stern, 331 F. Supp. 127 (D. Ariz. 1971), rev'd sub nom Duchess Music Corp. v. Rosner, 173 U.S.P.Q. 278 (9th Cir. 1972). In that case a large number of music publishing companies sought to permanently enjoin the unauthorized manufacture and sale of tape recordings of their musical compositions. The defendants were a large group of unauthorized duplicators and

retailers. A temporary restraining order had been issued at the time the original complaint was filed. A writ of seizure had also been issued and tapes, both recorded ones and blanks, as well as duplicating equipment, had been seized and impounded. At the beginning of the action none of the manufacturing defendants had attempted to comply with the compulsory license provisions of the copyright law. However, one of the defendants subsequently sent notices of intention to use to the copyright proprietors and copies of those notices to the Copyright Office. Thus, at the time of the hearing on the action permanently to enjoin the defendants, Pearl Rosner had admitted liability for acts up to her filing of the notices of intention to use but she argued she was not liable for any subsequent acts. She therefore sought to have the seized and impounded blank tapes and equipment returned.

Since the seizure issue is not within the scope of this study, I will only mention the holding of the District Court on the issue of the liability of a tape pirate who complies with the compulsory license provision of the copyright act.

The plaintiffs had argued first that the compulsory license provisions of the copyright act were not available to a duplicator of recordings of the licensees of the copyright proprietors, and alternatively that the filing came too late. In arguing that the compulsory license provisions were not available to duplicators, the plaintiffs relied on the Aeolian case (see page 20 of this study.) The District Court, however, stated that this case, while never expressly over-ruled, has been meagerly cited and severely criticized. That court stated that Sections 1(e) and 101(e) of the copyright act dictate that there be no exclusive licensee of the rights of mechanical reproductions. Yet the court noted that the Aeolian decision would nevertheless allow a licensee to seek an injunction on grounds that are incompatible with the compulsory license principle. This court noted that if the reasoning of the Aeolian court were correct, the practical effect would be to give the licensee a copyright in his record. The court cited the Capitol Records case (see footnote 22) as authority that Congress had not seen fit to do this.

The plaintiffs also argued that the Aeolian rationale was significantly similar to and compatible with certain common law rules of unfair competition which would prohibit such duplicating or pirating. The District Court rejected this argument saying that such an argument only served to illustrate another woeful inadequacy of the present copyright law. The court pointed out that the plaintiffs were seeking injunctive relief exclusively under the copyright law -- not under any theory of unfair competition.

In its reading of the copyright law, the court said that Congress had not differentiated between a subsequent manufacturer who imitates another manufacturer's product and one who merely duplicates

or appropriates the product with little or no investment of talent or skill. The court further cited the Goody case (see footnote 13) as authority that an unauthorized duplicator is a subsequent user within the terms of the act.

As to the plaintiff's argument that the notices of intention to use were filed too late, the court held that the defendants have the right, by belated filings of notices of intention to use, to take advantage of the compulsory licensing provisions for future manufacturing.

This decision was appealed on March 13, 1972, in a 2-1 decision, the U.S. Court of Appeals for the 9th Circuit reversed. Again I will mention only the holding on the issue of the applicability of the compulsory license provisions to those who engage in "tape piracy." The court held that a duplicatory was not a subsequent user within the meaning of the copyright act; that the making of exact and identical copies was clearly outside the scope of the compulsory license scheme.

To reach this decision the court relied on the Aeolian decision inspite of the severe criticism of that same case by the lower court. It stated that the "similar use" allowed in Section 1(e) is not an identical use and that in view of this it did not have to decide when a prospective licensee must invoke the compulsory license scheme.

Although not necessary to the decision the court did speak on the issue of "copying." Thus, the majority differentiated between the copying allowed by Scars and Compco and the appropriation engaged in by the tape pirates.

The rationale of the dissent in this case is more compelling. Essentially Judge Byrne's main argument was that there was a loophole in the unamended copyright act -- a loophole recognized by the Librarian of Congress, the State, Justice and Commerce Departments. He stated that it was generally agreed that federal legislation was needed since there was no federal protection of sound recordings under the unamended copyright act.

In conclusion, there is now a circuit court decision to the effect that a tape pirate may not rely on the compulsory license provisions of the copyright act. If this becomes settled law, the unauthorized duplicators will no longer have any reason to file notices of intention to use, and this would end the great upsurge of activity on this front that has materially increased the workload of the Music Section. However, it would seem that this matter is not settled.